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No. 08-255

IN THE
SUPREME COURT OF THE UNITED STATES

BURL CAIN, Warden,

Petitioner,

vs.

WALTER J. KOON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit applied proper deference to the state courts' decisions in this habeas corpus proceeding.

2. Whether the Fifth Circuit properly applied the Supreme Court of the United States standard in this habeas corpus proceeding when addressing an ineffective assistance of counsel claim.

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BRIEF IN OPPOSITION

The respondent, Walter J. Koon, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case, which is unpublished.

STATEMENT OF THE CASE

1. Respondent Walter "Joey" Koon, then a 47-year-old man with no prior felony convictions, drove to the home of the parents of his estranged wife to give her money from the sale of their jointly owned vehicle. On the way, he was told by his passenger, Sarah Robinson, that his wife of some 15 years was having an affair. Respondent, who was then operating under a toxic mix of legal and

illegal drugs, alcohol and raw emotions, parked his truck, got out, pulled out his gun and shot and killed his wife, who was in the yard, and his wife's parents, who were in the house. He then drove to his home and called the police to come pick him up.

Kevin Monahan, a solo practitioner with a history of disciplinary complaints and sanctions from the Louisiana State Bar Association,[1] was appointed to represent respondent, who was charged with three counts of first degree murder. Monahan admittedly liked to work alone and was not a fan of mitigation evidence. Based solely upon his interview of respondent about the events leading up to the killings, Monahan decided to enter a dual plea of not guilty and not guilty by reason of insanity and put all of his defense in the guilt phase. Monahan intended to rely on the adverse impact of a variety of forces on respondent's mental state at the time of the killings whereby he, Monahan, would argue to the jury that respondent was either rendered insane or without the necessary specific intent or was acting in the heat of passion. If this guilt phase defense did not work, Monahan hoped it would "spill over" into the penalty phase defense against death. Thus, Monahan made no effort himself, or with the assistance of a second attorney, an investigator or a mitigation expert, to investigate respondent's life prior to the immediate events leading up to the killings beyond his interview with his client and his brief conversations with respondent's mother and two brothers. Moreover, despite the importance to the trial defense of the forces impacting respondent at the time of the killings, and the significance of the impact of those forces on respondent's mental state, Monahan made no attempt to interview Sarah Robinson, the only eyewitness to the events leading

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[1]In the latest, Monahan was placed on one year of supervised probation based upon disciplinary proceedings finalized in June of 2006, during which period any further misconduct by Monahan could be grounds for additional discipline, including further suspension from the practice of law. *In re: Kevin Patrick Monahan*, 932 So.2d 678 (La. June 30, 2006).

up to and including the killings and did not even hire a mental health expert to evaluate his client until the Sunday before the first degree murder trial began. The jury returned a verdict of guilty on all three counts of first degree murder and, after a penalty phase in which Monahan's defense against death consisted only of the brief, unprepared testimony of respondent's mother, returned sentences of death on each count.

2. When respondent sought to raise the claim of Monahan's ineffectiveness under the Sixth Amendment in state post-conviction proceedings, the state trial court would not allow him to call at the state evidentiary hearing any subpoenaed witnesses and only considered the testimony of Monahan and another attorney, Denise Vinet, who was briefly appointed to the case, but did nothing and did not participate in the trial. *See* Pet.App. 88-91, 196-198. In denying respondent the opportunity to present the testimony of his subpoenaed witnesses in support of his claim that his trial counsel was ineffective, the state trial court explained that, after hearing Monahan's testimony, "I don't need to hear that evidence to make that determination" since "[t]he purpose of a post-conviction hearing is not to retry the case, not to present different facts that might have changed the jury's decision." Pet. App. 197.

The state trial court rejected respondent's ineffective assistance of counsel claims, concluding that Monahan "was prepared" for trial and "did a good job *with what he had to work with*." Pet.App. 189 (emphasis added). According to the state trial court, "I don't know that any evidence could have prevented Mr. Koon from being convicted, that Mr. Monahan failed to object to, and being sentenced to death. Mr. Koon very cold-bloodily killed three people." Pet.App. 196. With regard to Monahan's failure to investigate the penalty phase, the state trial court acknowledged "that is probably the biggest question that I have in this." Pet.App. 192. The state trial court stated further,

"[m]aybe had there been another lawyer more testimony might have been presented, maybe, not." Pet.App. 192. Noting the existence of affidavits conflicting with Monahan's testimony that respondent's brothers and his preacher-uncle refused to testify at the penalty phase, the state trial court concluded, "I don't know if at the trial they would have [testified] . . ." Pet.App. 192-193. Moreover, the state trial court stated in this regard, "what these other people could have said that would change the jury's mind, which is one of the factors, whether or not he got a fair trial because Mr. Monahan didn't call everybody and his brother, so to speak to testify about Mr. Koon and anything that he may have done that's been . . . nice or anything that may have affected him in childhood, I don't know whether that changes anybody's mind." Pet.App. 193.

3. After exhausting his ineffectiveness claims in the state courts, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 by a person in state custody in federal court. Record on Appeal ("ROA") at Vol. 1, pp. 18-72. The federal district court initially ordered an evidentiary hearing limited to the question of whether respondent received ineffective assistance of counsel at the penalty phase of his trial. ROA at Vol. 1, pp. 169-170. Subsequently, the district court ruled that it would allow respondent to put on evidence at the evidentiary hearing relative to the guilt phase with respect to one witness, Sarah Robinson. ROA at Vol. 2, p. 179. Following a status conference after the federal evidentiary hearing, which spanned four days, the district court issued a notice and order that it had "informed both parties that it would consider Koon's claims of ineffective assistance of counsel as it related to both the guilt phase and the penalty phase of his jury trial," and "[n]o objections were made on this issue." ROA at Vol. 4, p. 532.

At the federal evidentiary hearing, Monahan again testified. In addition, respondent presented the testimony of Sarah Robinson, the eyewitness to the killings and to the events leading

up to them the week and hours prior, as well as the testimony of respondent's mother, two brothers and his preacher-uncle. Respondent also presented the expert testimony of psychologist Mark Vigen, Ph.D., psychiatrist George Seiden, M.D., and criminal defense attorney Phyllis Mann.

According to Monahan, the theory of defense, which he admitted was based solely on his conversations with respondent about the facts of the case, was that respondent "just had one bad week, beginning with the Friday afternoon, which was the week before the actual murder," and after he and his wife had physically separated, during which he ingested Xanax and other drugs with Sarah Robinson, and at the end of which he had not only lost his wife and had a tax lien and was sick, but he was told that his wife was having an affair and "he snapped." ROA at Vol. 8, pp. 97, 99, 112. Based on this, Monahan "felt that that was a heat-of-passion-type of thing, plus fueled by the fact that he was in some sort of withdrawal from all the chemicals that he had been ingesting." *Id.* at p. 100. Therefore, Monahan "went with he didn't know what he was doing. He, at that moment, did not know right from wrong because of the pressure, because of the withdrawal of the drugs." *Id.* at p. 106.

Prior to trial, Monahan entered on respondent's behalf a dual plea of not guilty and not guilty by reason of insanity. State Record ("St.R.") at Vol. II, p. 266. In addition, almost a year before the trial, Monahan moved for authority to retain a psychiatrist/psychologist for mental examination. St.R. at Vol. I, pp. 84-95. The state trial court granted the defense request by authorizing the expenditure of funds in the amount of $2,000 for a Dr. Cenac. *Id.* at p. 6. However, there is no evidence in the record that Dr. Cenac was ever employed by Monahan as an expert.

Despite relying on a mental health defense and despite having been granted funds for expert assistance well in advance of trial, Monahan did not employ the services of a mental health expert

until the Sunday before trial, at which time the expert, psychologist Marc Zimmerman, Ph.D., was able to spend just over an hour interviewing respondent. St.R. at Vol. VIII, pp. 1952, 1963. Dr. Zimmerman also administered several tests, including the Minnesota Multiphasic Personality Inventory ("MMPI"), but did not consult with any other family members or other collateral sources in making his diagnoses. *Id.* at 1973. As respondent's mental health experts testified at the federal evidentiary hearing without contradiction, because of Monahan's failure to employ the services of a mental health expert until the day before the first degree murder trial began, Dr. Zimmerman (1) did not have sufficient time to develop a complete psychological history of respondent; (2) did not have sufficient information, including information from sources collateral to respondent, upon which to base an opinion as to respondent's mental state at the time of the crime; (3) was in error in many significant respects, including his diagnosis of a non-existent psychological disorder; and (4) failed to elaborate adequately on the effect of substance abuse on respondent's behavior. ROA at Vol. 4, pp. 544-45. *See also* ROA at Vol. 5, pp. 88-93, 98, 155, 157. As respondent's expert psychiatrist, Dr. George Seiden, testified, "[i]f your defense is a mental-health defense, you're using a mental-status defense as your primary area of defense, your primary expert should be a mental status or mental-health expert. And that person needs to be hired more than a day ahead of time to work with you as an attorney." ROA at Vol. 6, p. 18.

According to Dr. Seiden, who performed an extensive evaulation of respondent, his mental status "clearly was impaired" at the time of the killings. ROA at Vol. 5, pp. 177-178, 182. Also according to Dr. Seiden, the effect on respondent's mental status at the time of the killings of each of the individual substances used by respondent, particularly Xanax, Valium, alcohol, cocaine and narcotic cough medicine, as well as respondent's mental and emotional state, needed to be, but was

not, explained to the jury at respondent's first degree murder trial. *Id.* at pp. 182-183.

In the State's rebuttal at the guilt phase to the expert mental health testimony Monahan did present, the prosecution called Dr. Donald Hoppe, a clinical psychologist who did not interview respondent, but only reviewed the results of the MMPI administered by Dr. Zimmerman. St.R. at Vol. IX, pp. 2162, 2166-2167. Again, because of Monahan's lack of investigation and preparation and his last minute hiring of Dr. Zimmerman, what expert mental health testimony was presented in support of Monahan's theory of defense was subject to attack to devastating effect. Not surprisingly, Dr. Hoppe criticized Dr. Zimmerman for not interviewing respondent for longer than an hour and for not getting "corroborating data from people who were familiar with him, particularly, at the time of the event, to know with any confidence, what was really going on at that time." *Id.* at 2177. Moreover, Monahan was totally unprepared to address Dr. Hoppe's testimony and was not even aware that, as respondent's expert psychologist Dr. Mark Vigen testified at the federal evidentiary hearing, there was simply no literature to support Dr. Hoppe's broad ranging interpretation of respondent's MMPI results to the effect that they showed respondent was not remorseful, was a liar, was manipulative and was violent. ROA at Vol. 5, pp. 110-112, 114-117, 119-120, 121-123. Further, it did not even cross Monahan's mind to request surrebutal or to call Dr. Zimmerman during the penalty phase to rebut the damaging testimony of Hoppe, the last word on respondent's mental health that the jury heard before they decided his fate. ROA at Vol. 8, pp. 152-154.

In addition to Monahan's failure to hire his chief expert witness until one day before trial, Monahan did not even attempt to interview Sarah Robinson, despite her critical status as the eyewitness to the killings and to the events leading up to the killings in the week and hours before.

According to Monahan, it was his practice never to interview a state's witness. ROA at Vol. 8, p. 110. Instead, Monahan hoped that Robinson would hear his opening statement and "if she heard those facts that I was saying, she would help [respondent] and say that she did tell him that she [his wife] was having an affair [with Joey LeBlanc] and that she [Robinson] was supplying drugs." *Id.* at 110-111. Contrary to Monahan's hope, at trial Robinson denied that respondent drank anything the Friday morning of the killings, claimed that she was not sure whether he drank any the previous Thursday night and denied seeing him take any drugs, including Xanax. St.R. at Vol. VII, p. 1732. She also denied that she told respondent that his wife was having an affair. *Id.* at p. 1769.

At the federal evidentiary hearing, Robinson testified and recanted critical aspects of her trial testimony regarding the circumstances leading up to the killings and further testified that she would have cooperated with Monahan prior to trial had he approached her. According to Robinson, had Monahan attempted to interview her before Koon's first degree murder trial, she would have told him about the drugs that respondent was doing *the morning of the killings*, which included cocaine, Xanax, Valium and beer, *as she told the state's attorney*. ROA at Vol. 5, pp. 27, 67. Moreover, Robinson also would have admitted that the truth is she did tell respondent about the affair with Joey LeBlanc on the way to his wife's parents' house, and she would have told Monahan had she simply been assured that she would not be held criminally responsible for the killings as a result of her statement in this regard, which was her big fear and her reason denying the statement at trial. *Id.* at 19, 26, 43, 66-67. As Robinson testified at the federal evidentiary hearing, "to this day I wish I would have never said anything [to respondent about the affair with LeBlanc]," and admitted to feeling tremendous guilt over what happened. *Id.* at 26, 43. After viewing "Robinson's demeanor carefully," the federal district court found "Robinson's testimony at the federal hearing to be very

credible, and accept[ed] it as true." Pet.App. 48.

4. The federal district court concluded that respondent was denied the effective assistance of counsel during the guilt phase of his first degree murder trial as a result of Monahan's failure to investigate and at least attempt to interview the only known eyewitness to the crime, Sarah Robinson. Pet.App. 51-57. Additionally, the district court concluded that Monahan was ineffective as a result of his failure to employ an expert witness on the issue of respondent's mental state at the time of the killings *until one day before* the trial. Pet.App. 57. The district court also concluded that Monahan's constitutionally deficient performance in the guilt phase of the first degree murder trial was prejudicial to respondent. Pet.App. 59. According to the district court, had Monahan attempted to interview Robinson before trial, she would have talked to him and told him about the drugs respondent was doing in the early morning hours of the day of the killings and confirmed that she had informed respondent of his wife's affair with LeBlanc only moments before respondent killed his wife and her parents. Pet.App. 60. Also, the district court concluded that Monahan's failure to provide Dr. Zimmerman with additional time, rather than one hour, one day before trial, was prejudicial. Pet.App. 61. According to the federal district court:

> The court is disturbed by Monahan's performance. A review of the record shows that Koon's actions could have been construed as something less than first-degree murder – be it second degree murder . . . or manslaughter . . . . Had Monahan investigated the case, outside of simply relying on what Koon told him, there is a reasonable probability that Koon would not have been found guilty of first degree murder. Thus it follows that confidence in the outcome of the trial has been undermined.

Pet.App. 62.

Significantly, the federal district court found that the state court, in finding that Monahan was prepared in that he "did a good job with what he had to work with," constituted an unreasonable

application of federal law as reflected in *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). Pet.App. 62. As the federal court explained: "[t]he state court's reasoning fails to acknowledge that Monahan's performance was to be measured by an objective standard of reasonableness under prevailing professional norms, not by his own limited investigation." Pet.App. 63. Thus, what Monahan "had to work with" was limited by his own constitutionally deficient performance. Pet.App. 63.

The federal district court likewise concluded that, although there was significant evidence that respondent's mental state was impaired at the time of the killings, Monahan failed to introduce any such evidence in mitigation of death. Pet.App. 65-66. Moreover, the district court concluded that, directly contrary to Monahan's testimony, which the district court did not find credible, respondent's two brothers and his preacher-uncle were willing to say positive things about respondent in mitigation of the death penalty and were "very sincere and credible in this regard." Pet.App. 69. According to the district court, beyond the few family members Monahan very briefly spoke to, he did not investigate, prepare, or in essence even present a case in mitigation of death, despite the existence of a great deal of mitigation evidence, of which, Monahan was "not a big fan." Pet.App. 71. The district court concluded that Monahan failed to make a reasonable investigation into respondent's background that prejudiced respondent at the penalty phase of his first degree murder trial. Pet.App. 75-77. Again, the district court concluded that the state court, in rejecting the claim based on penalty phase ineffectiveness, "applied the wrong legal standard" and "unreasonably applied federal law." Pet.App. 80-81.

5. In affirming the federal district court's grant of habeas relief based upon ineffective assistance of counsel at the guilt phase of respondent's first degree murder trial, the Fifth Circuit

concluded, at the outset, that there was "no merit to the State's contention that the district court failed to afford proper deference to the state court's decisions and rulings. Pet.App. 2. Citing to 28 U.S.C. § 2254(d), the panel explained that a state court's decision that correctly identifies the governing legal rule but unreasonably applies it to the facts of a particular prisoner's case provides a sufficient basis for a federal habeas court to grant the writ. Pet.App. 2, 8-9. According to the Fifth Circuit: "[c]onsidering Monahan's failure to interview Robinson and his botched handling of Zimmerman, together with his other deficiencies identified by the district court, we see as inescapable the conclusion that Monahan's performance was deficient during the guilt/innocence phase of Koon's trial." Pet.App. 15. Also according to the appellate court, "[e]qually inescapable is the conclusion that Koon was prejudiced by Monahan's deficient performance: There is a reasonable probability that the jury would have convicted Koon of a lesser offense than first degree murder if Monahan's performance had not been deficient." Pet.App. 15-16. The Fifth Circuit concluded that, "the state court's ruling that Koon was not denied effective assistance of counsel during the guilt/innocence phase of his trial is objectively unreasonable." Pet.App. 17.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Question Presented In *Bell v. Kelly*, No. 07-1223 Or Any Issue On Which There Is A Circuit Conflict

The petitioner seeks certiorari review on the basis that, pursuant to *Bell v. Kelly*, No. 07-1223 (cert. granted May 12, 2008), there is "a split in the circuits regarding the application of 28 U.S.C. § 2254(d) where new evidence is presented in a federal court." Pet. 9. As the petitioner notes, and as the opinion below evidences, the Fifth Circuit takes the position that the standard of § 2254(d)

applies even when new evidence relevant to a claim has been properly presented[2] for the first time on federal habeas. *Id.* Even if there is a circuit conflict on this issue, and even if it is one that this Court may resolve in *Bell v. Kelly*, it is irrelevant to the present case and petitioner's petition. Not surprisingly, petitioner did not argue below that § 2254(d)'s deferential standard should *not* apply in evaluating respondent's ineffectiveness claims as a result of the introduction of evidence the state court refused to consider and that was properly received for the first time at the federal evidentiary hearing. But neither did respondent argue this, and both the federal district court and the appellate court applied the deferential (and harsher from a habeas petitioner's perspective) standard of § 2254(d), but nevertheless concluded that respondent had satisfied it. As a result, even if this Court were to disagree with the Fourth Circuit, as well as the Fifth Circuit, in *Bell v. Kelly* and conclude that a habeas petitioner does not have to satisfy the more deferential standard of § 2254(d) in order to obtain relief on a claim predicated on evidence the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing, it would have no impact on the correctness or the reviewability of this case. Accordingly, the pendency of *Bell v. Kelly* does not support the grant of certiorari review, nor does it warrant the holding of this petition (which the petitioner has not asked for) until *Bell v. Kelly* is argued and decided this Term.

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[2]While petitioner objected at the outset to a federal evidentiary hearing on respondent's ineffective assistance of counsel claims, it did not object to the federal district court's expansion of that hearing to include guilt phase as well as penalty phase ineffectiveness and did not raise the issue on appeal.

2. The Petition Does Not Warrant Review By This Court Since It Presents Nothing More Than A Disagreement With The Fifth Circuit's Application Of Settled Law To The Particular Facts Of This Case

It is clear from the petition that petitioner's primary disagreement with the federal courts below is not with the law, but with the application of the law to the facts of this case. As the petition puts it: "[t]he panel decision noted this Court's standard for reviewing habeas cases, but failed to properly apply that standard to the facts of this case." Pet. 11. This is an insufficient basis for certiorari review.

The Fifth Circuit applied this Court's settled precedent regarding ineffective assistance of counsel claims in its review of the district court's grant of habeas corpus relief in a straightforward case based on the failure of respondent's attorney to investigate and prepare for respondent's defense against first degree murder charges and the death penalty. Both with respect to the ineffective assistance of counsel claims and the state district court's adjudication of those claims, the case did not present an unusual set of facts or a unique issue of state law which this Court's precedents have not previously addressed. As petitioner conceded: "[t]he instant case is not an exceptional one." Pet. 32. As a result, this Court's recent grants of certiorari review in the habeas cases cited by petitioner, *see* Pet. 13-15, do not support the granting of certiorari review in this case simply because the petitioner disputes that the federal courts accorded the proper deference to the state courts under § 2254(d). *See, e.g., Knowles v. Mirzayance*, No. 07-1315 (cert. granted June 27, 2008) (involving review of Ninth Circuit's application of § 2254(d) in case presenting counsels' failure to advance the defendant's only affirmative defense, that of insanity, which unique factual situation has not been specifically addressed by this Court); *Waddington v. Sarausad*, No. 07-772 (cert. granted Mar. 17, 2008) (case involving application of standard of § 2254 to due process challenge to jury instruction

that state court found fully and correctly set out state law and for which state court concluded there was no reasonable likelihood that the jury misapplied the instruction so as to relieve the prosecution of its burden of proving all the elements of the crime); *Schriro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933 (2007) (case involving factual situation not previously decided by this Court in which the client interfered with counsel's efforts to present mitigating evidence to a sentencing court by making an in-court waiver of his right to present a mitigation defense); *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649 (2006) (case which presented the issue of the potentially prejudicial effect of spectators' courtroom conduct for which there was a lack of holdings from this Court).

Since the decision below turns on the application, with which petitioner disagrees, of settled precedent of this Court to the particular facts of this case involving straightfoward claims of ineffective assistance of counsel as a result of multiple failures to investigate and prepare for respondent's defense against first degree murder and the death penalty, it does not warrant certiorari review.

3. The Fifth Circuit's Application To The Facts Of This Case Of This Court's Precedent Regarding Ineffective Assistance of Counsel Claims and The Review of State Court Adjudications of Those Claims Is Correct

At its essence, the petition disputes the correctness of the Fifth Circuit's application of this Court's opinions addressing ineffective assistance of counsel claims in the context of a first degree murder trial. The Fifth Circuit correctly recognized that the governing legal principles for respondent's claims of ineffective assistance of counsel were established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Pet.App. 9. The appellate court acknowledged that ineffective assistance of counsel under *Strickland* is deficient performance by counsel resulting in prejudice, 466

U.S. at 687, with performance being measured against an "objective standard of reasonableness," *id.* at 688, "under prevailing professional norms." Pet.App. 9.

Moreover, as the Fifth Circuit correctly noted, this Court has long referred to American Bar Association ("ABA") Standards for Criminal Justice "as guides to determining what is reasonable," *Strickland*, 466 U.S. at 688. Pet.App. 9. The American Bar Association Standards for Criminal Justice in circulation at the time of respondent's trial in 1995 describe defense counsel's general duty to investigate as follows:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities.

ABA Standards for Criminal Justice, Standard 4-4.1 (3rd ed. 1993) (hereinafter ABA Standards). As this Court stated in *Rompilla v. Beard*, 545 U.S. 374, 387, n. 6 (2005), we "cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities."

Citing to this ABA Standard, the Fifth Circuit correctly concluded that Monahan's failure even to *attempt* to interview Sara Robinson, the only eyewitness to the killings and to the critical events leading up to them, given that Monahan's defense centered on respondent's mental state at the time of the killings, constituted deficient performance *per se*. Pet.App. 11-12. Moreover, the Fifth Circuit concluded that Monahan's decision not to hire Dr. Zimmerman, his primary mental health expert, until *one day* before trial exacerbated his overall deficient performance at the guilt phase. Pet.App. 14. As the Fifth Circuit explained: "[n]ot only did Monahan make a questionable decision to pursue a detoxification defense on his own (without first consulting a medical

professional and substantiating his theory), but he then severely limited the effectiveness of even that questionable defense by enlisting an expert who was not given even minimally sufficient time to gather information in support of his opinions." Pet.App. 15. The Fifth Circuit concluded that "[c]onsidering Monahan's failure to interview Robinson and his botched handling of Zimmerman, together with his other deficiencies identified by the district court, we see as inescapable the conclusion that Monahan's performance was deficient during the guilt/innocence phase of Koon's trial." Pet.App. 15. This conclusion is entirely consistent with this Court's governing precedent.

In recent years, this Court has applied the standards established in *Strickland* in several cases and concluded in each that the petitioner's ineffectiveness claim was meritorious. Thus, for example, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court found that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background. 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). Likewise, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court concluded that capital defense counsel, who hired a psychologist to evaluate the petitioner and who reviewed both a previous PSI that included some of petitioner's life history and noted his misery as a youth and department of social service records that documented his foster care placements, nevertheless was ineffective because "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989," which included the preparation of a social history report. 539 U.S. at 523-524. This Court also concluded that counsel's failure to expand the investigation into petitioner's life history "fell short of the standards for capital defense

work articulated by the American Bar Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.'" 539 U.S. at 524, *quoting Strickland v. Washington*, 466 U.S. at 688. And in *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court once again found a capital habeas petitioner's claim of ineffective assistance of counsel claim had merit, holding that:

> [E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

545 U.S. at 377. This Court emphasized that "[t]his case, like some others recently, looks to norms of adequate investigation in preparing for the sentencing phase of a capital case, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Id.* at 380-381. Furthermore, this Court concluded that "*[t]he notion that defense counsel must obtain information that the State has and will use against he defendant is not simply a matter of common sense*," but is dictated by the ABA Standards for Criminal Justice in circulation at the time of Rompilla's trial. *Id.* at 387 (emphasis added). The Fifth Circuit's conclusion that Monahan's failure to even attempt to interview the eyewitness to the killings, whom he knew would be a witness for the prosecution, as well as his failure to employ the services of his key mental health expert in support of his mental health defense until the Sunday before trial, constitutes deficient performance in light of the then-prevailing professional norms regarding an attorney's duty to investigate is entirely consistent with these Supreme Court cases.

With respect to the issue of prejudice, the Fifth Circuit's "inescapable" conclusion was that respondent "was prejudiced by Monahan's deficient performance: There is a reasonable probability that the jury would have convicted Koon of a lesser offense than first degree murder if Monahan's

performance had not been deficient." Pet. App. 15-16. This is the correct standard as set forth by this Court in *Strickland*: to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. As the Fifth Circuit explained:

> If Monahan had interviewed Robinson before trial, she may have told the truth instead of controverting Koon's testimony regarding his mental state at the time of the killings. It follows that the jury could have and likely would have given greater consideration to the "heat of passion" aspect of Koon's defense. If, on the other hand, Robinson had continued to insist on denying that she had told Koon about his wife's affair after Monahan interview her, he would have been aware of Robinson's intended testimony and could have adjusted his defensive strategy accordingly and mitigated the damaging effects of Robinson's testimony. Furthermore, if Zimmerman had been retained a reasonable time in advance of trial, he would have had plenty of time to evaluate Koon and interview his friends and family. That way, Zimmerman could have formulated a more informed opinion on Koon's mental state and been prepared to support and defend that opinion on cross-examination. In short, if Monahan's performance had not been deficient and prejudicial, it is probable that Koon's level of culpability would have been reduced in the eyes of the jury. These failings by Monahan, which subverted both the insanity and manslaughter aspects of Koon's defense, undermine any confidence we might otherwise have in the propriety of his first degree murder conviction.

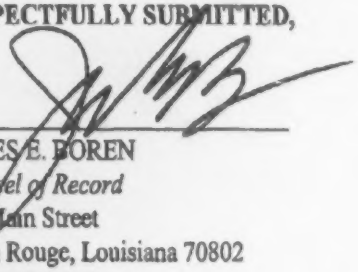
Pet.App. 16-17. This application of this Court's standard of prejudice as set forth in *Strickland* to the facts of this case is correct and consistent with the opinions of this Court. *See, e.g., Rompilla v. Beard*, 545 U.S. at 393 (because of defense counsel's failure to look in the file on Rompilla's prior conviction, evidence in mitigation was not discovered which, "taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing) (citations omitted).

Finally, the Fifth Circuit correctly concluded that the state court's ruling that respondent was not denied the effective assistance of counsel at the guilt/innocence phase of his trial was objectively unreasonable. Pet.App. 17. As previously noted, the state trial court found with respect to respondent's ineffectiveness claim that Monahan was prepared for trial and "did a good job *with what he had to work with*." Pet.App. 189 (emphasis added). This conclusion, however, fails to recognize that "what he had to work with" was limited by Monahan's critical failure to investigate, a failure that is itself ineffective assistance of counsel. Moreover, according to the state trial court, "he presented evidence that he felt might, at least, mitigate . . . the actions of Mr. Koon in the guilt phase, that he thought that he could, and as a result of his prior experiences could convince a jury that Mr. Koon did not intend to commit the acts that he committed; that there was some other force, whether it be drugs or rage or whatever it was that caused Mr. Koon to commit the acts that he did." *Id.* This conclusion likewise fails to recognize that the standard by which counsel's performance is to be judged is not what worked once before for counsel, but what is mandated by the Constitution, Supreme Court precedent, and prevailing professional norms, all as set forth above. Under the circumstances, the Fifth Circuit's conclusion that the state court's ruling denying relief based upon ineffective assistance of counsel at the guilt/innocence phase was objectively unreasonable is entirely consistent with this Court's precedent. *See, e.g., Rompilla v. Beard*, 545 U.S. at 390 (the state courts were objectively unreasonable in concluding that trial counsel could reasonably decline to make any effort to review a client's prior conviction file that the prosecutor says it will use at trial). Accordingly, the opinion below, for which there was no dissent or *en banc* consideration, was correctly decided on the merits and, thus, does not warrant certiorari review.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,



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No. 08-255

IN THE
SUPREME COURT OF THE UNITED STATES

BURL CAIN, Warden,

Petitioner,

vs.

WALTER J. KOON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

CERTIFICATE OF SERVICE

I, James E. Boren, a member of the Bar of this Court, hereby certify that on this 29th day of September, 2008, one copy of the respondent's Brief in Opposition to the Petition for a Writ of Certiorari in the above-entitled case was mailed with first class postage prepaid to the Mr. Dale R. Lee, Parish of East Baton Rouge, 222 St. Louis Street, 5th Floor, Baton Rouge, LA 70802, counsel of record for petitioner herein. I further certify that all parties required to be served have

been served.

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